PEGANG PROSPECTING CO. LTD. v. CHAN PHOOI HOONG & ANOR.

[C. A. (Mathew C.J., Murray-Aynsley C.J. (S), and Pretheroe J.) April 12, 1955, May 28, 1955]

[Ipoh — F.M. Civil Appeal No. 29 of 1954]

Arbitration — Second award — Validity of — Failure or refusal to decide questions of law — Ambiguity — Remission or setting aside — Order setting aside award — Whether final or interlocutory — Whether fit for appeal to Privy Council.

An agreement contained a clause for the renewal of Subleases over 4 pieces of mining land so far as such Subleases shall be required for the proper carrying out of the mining scheme. The disputes between the parties were submitted to an arbitrator. On March 30, 1953 the arbitrator delivered his "award" which, amongst others, dealt with so much of the costs as consisted of the arbitrator's fees and expenses only. On his attention being drawn to this by Counsel for 2 of the 3 parties to the arbitration, the following day the arbitrator delivered a "Second award" dealing with all the other costs, and which he apportioned in different proportions than in the "award".

The arbitrator also delivered with his "award" a "Summary by arbitrator" which contained many facts and reasonings for his award. The arbitrator refused to decide certain questions as being questions of law and further held that "having due regard to force majeure" the respondents had complied with the terms of the agreement.

Held: (1) the arbitrator having consistently taken up the attitude that he would only decide questions relating to mining and would *not* decide any questions of law, justice could not be done by remitting the award and it must be set aside;

(2) the arbitrator took a fundamentally wrong view of his functions and no supplementary findings can put the matter right;

(3) the award is ambiguous and uncertain, which is a fatal defect.

Held further, by the Court: an order remitting an award is an interlocutory order and this was not a fit case where leave to appeal to the Privy Council should be granted.

Held, by Thomson J. on the original motion: under the Arbitration Ordinance, 1950, an arbitrator has no power to make an interim award and no power to alter his award except under the slip rule and, therefore, the "Second award" must be set aside.

Cases referred to :—

(1) *Sutherland & Co. v. Hannevig Brothers Ltd.* (1921) 1 K.B. 336.

(2) *R. v. The Metropolitan Railway Co.* (1883) 48 L.T. 367.

(3) *Odlum v. City of Vancouver & Canadian Pacific Railway Co.* 133 L.T. 795: (1915) 85 L.J. (P.C.) 95.

(4) *Kiril Mischeff Ltd. v. Constant Smith & Co.* (1950) 2 K.B. 616.

(5) *Re An Arbitration between Montgomery, Jones & Co. and Liebenthal & Co.*, 78 L.T. 406.

(6) *Re Tidswell*, 33 Beav. 213; 55 E.R. 349.

(7) *In Re Croasdell & Cammell Laird & Co Ltd.* (1906) 2 K.B. 569.

(8) *Ayyar v. Ayyar* L.R. (1920-21) 48 I.A. 31

(9) *Radha Kishen Das v. Rai Krishen Chand* L.R. 28 I.A. 182.

(10) *Govind Das v. Indrawati*, A.I.R. 1940 All. 38.

COURT OF APPEAL.

Sir Roland Braddell (*B. K. Das* with him) for the appellants.

L. A. J. Smith (*Yeoh Cheang Lee* with him) for the respondents.

Appeal from the decision of Thomson J. in so far as he decided that the award of the arbitrator ought not to be set aside but remitted to him for his reconsideration.

By an agreement dated 22nd October, 1931 made between the Company (hereinafter called the applicants) of the first part, the predecessor-in-title of C.P.H. therein referred to as Sublessee of the second part and the predecessor-in-title of T.S.K. therein referred to as the Miner of the third part (hereinafter called the 1st and 2nd respondents) the Company agreed, upon renewal of its head-leases by the Government, to renew from time to time the Subleases in respect of 4 pieces of mining land granted by it to the 1st respondent "so far as such subleases shall be required for the proper carrying out" of the mining scheme therein referred to. The agreement contained an arbitration clause in common form. Differences having arisen and the parties being unable to agree upon an arbitrator, a mining engineer was appointed by the Court.

The respondents claimed that upon the renewal of the head-leases the applicants were obliged to renew to the 1st respondent the subleases over the 4 pieces of mining land, the same being required for the proper carrying out of the mining scheme. 2nd respondent claimed as against 1st respondent (Point of Claim No. 3) that upon such subleases being granted she was entitled to sub-leases of those lands on the same terms as the expired sub-leases which claim was disputed by 1st respondent.

The applicants, by their points of defence, expressed their willingness to renew the sublease over 2 pieces of land, but as to the other 2 pieces (M.Ls. 11544 and 10217) they contended that they were not required for the proper carrying out of the mining scheme, that the respondents were estopped by reason of their acts and conduct from claiming a sublease over them and that the respondents had committed breaches of the agreement and of the expired sublease and were dis-entitled to make such claim. The applicants further contended that as to one piece of land (M.L. 11544) that it was subject to an existing sublease in favour of a third party, not a party to the arbitration proceedings, to the knowledge of the respondents and that as to the other piece of land (M.L. 10217) the claim for renewal was barred by limitation.

On the first day of hearing before the arbitrator 1st respondent contended that the claim of 2nd respondent against him was outside the terms of reference, the arbitrator accepted such submission on the ground that he "considers that it is a point of law" but proceeded with the further hearing in which he held all the three parties were interested and 2nd respondent was entitled to be heard.

On March 30, 1953 the arbitrator handed to Counsel for the parties his award (hereinafter called the award) and another document headed "Summary by Arbitrator"

which set out a considerable body of facts and reasoning which had influenced him in making his award. The award was to the effect that all the 4 pieces of land were required for the proper carrying out of the mining scheme, that "having due regard to force majeure, the Miner, and therefore the Sublessee have complied with their part of the agreement . . . . . ." and that the applicants were obliged to execute new subleases in favour of 1st respondent. The award further stated that "Point of Claim No. 3 was ruled by me as not being before me being a point of law". The award then dealt with so much of the costs as consisted of the arbitrator's fees and expenses only. The arbitrator's attention being drawn to this by Counsel for the respondents, on the following day he produced another award (hereinafter called the second award) which purported to deal with the other costs, which he apportioned in different proportions.

The applicants then moved the Court to set aside the award and the second award.

Thomson J., in the course of his judgment setting aside the second award, said:— "Although there is some small controversy as to how this came into existence the material facts do not seem to be in dispute. At the end of the hearing counsel for all parties asked the arbitrator to deal with the question of costs. When the Award was handed to counsel on 30th March it was observed that it only dealt with so much of the costs as consisted of the arbitrator's fee and expenses. This was pointed out by counsel for the Sub-lessee and the Miner (who were at that stage separately represented) but, whatever was said by them it is admitted that no request was made by counsel for The Company that anything further should be done in the matter. There was a perfectly satisfactory reason for this. The arbitration had taken place in Ipoh where the Company was represented by Ipoh counsel. Counsel who appeared at Kuala Lumpur on 30th March was a local counsel who had not been previously engaged in the proceedings, who had no knowledge of them and whose instructions were confined to receiving the Award.

"I think that what happened is that either the arbitrator had overlooked the request which had previously been made to him to deal with the costs or, which is perhaps more probable, that not being a lawyer he had not realised that when he was asked to deal with the question of costs he was being asked to deal with the whole question of costs *inter partes*. Be that as it may, when he realised the position, he proceeded to deal with it according to his lights and it was in these circumstances that on the following day he produced the Second Award which purported to deal with the question of all the costs other than his own fee and which, incidentally, for reasons which I find myself unable to imagine, apportioned them in different proportions from those in which he had the previous day apportioned his own fee.

"The local law relating to arbitration as contained in Ordinance No. 12 of 1950 follows the English Act of 1889 but does not embody the amendments to that Act contained in the 1934 Act and now embodied in the 1950 Consolidation Act. In particular, it does not contain the provision, now to be found in section 14 of the English Act of 1950, which enables an arbitrator to make an interim award. Moreover, it does not enable him to alter his award in any way after he has made it unless it is remitted to him by the Court except (section 8(c)) in so far as he may correct any clerical mistake or error arising from any accidental slip or omission and in the case of **Sutherland and Company v. Hannevig Brothers, Ltd.**[1], it was held in effect that a failure on the part of an arbitrator to deal as he had intended to do with the question of costs was not an 'error arising from any accidental slip or omission'.

"In the light of the law as thus stated it was submitted that the first Award was to be regarded as either an interim award or a final award. If it was an interim award it was bad because the arbitrator had no power to make an interim award. If it was a final award, then the second Award was bad because when it was made the arbitrator was *functus officio* unless the award was remitted to him by the Court, or, except in so far as was necessary to correct any accidental slip or omission.

"In my opinion (and I think this was conceded) the dilemma is a perfect one and what I have to decide is upon which of its horns one or other of the two awards is to be impaled. I do not think the answer can be in any doubt. In the circumstances of the case as I have described them to call the Award an interim award would be a misuse of language. The arbitrator himself at the time he made it clearly regarded it as a final award disposing of all the questions before him, and the so-called Second Award was neither more nor less than an after-thought. In the circumstances, it is the Second Award that cannot stand and it must be set aside."

As to the award, Thomson J. said that it was argued on behalf of the applicants that by reason of what was said in the Summary, the arbitrator misconstrued the agreement in that he took the view that the 4 pieces of land were irrevocably connected in law. He did not think that the arbitrator did take such a view but even if he did the point was irrelevant for the arbitrator found as a fact that the 4 pieces of land were required for the mining scheme. He then referred to the applicants' contention that the award contained the proposition that "force majeure", whatever that may mean, is in law an excuse for failure to comply with a condition precedent, and that was an error in law, and said that, although the expression "force majeure" used by the arbitrator was unfortunate, what the arbitrator had done was to take into account certain statutory restrictions on the output of tin and the effect of the late war and found as a fact that in the circumstances there was no breach.

He then referred to the failure or refusal of the arbitrator to decide Point of Claim No. 3 (which related to the claim of 2nd respondent against 1st respondent) and said that such failure or refusal amounted to misconduct on his part but that the applicants could not rely upon that misconduct to have the award set aside for to that dispute they were strangers.

With regard to the contention of the applicants that certain observations of the arbitrator in his summary suggested that he did not think he had power to decide any questions of law and, in fact, he did not, Thomson J. said that the onus was on the Applicants to shew that such was the case, for it must be presumed, until the contrary is shewn, that the "award is made upon all the matters referred, unless it is apparent on the face of it that it is not so made." **Reg. v. The Metropolitan Railway Co.**[2]. He then held that the arbitrator had failed to decide the question of limitation and the whole of the question of costs and said:

"This regrettable failure on the part of the arbitrator to consider the question of limitation may be looked at in one of two ways. It may be taken to shew that he has not finally disposed of all the matters referred to him or it may support the contention that there is an error of law on the face of the Award, that error lying in the implicit proposition that the Sublessee is entitled to renewal irrespective of whether or not limitation has run against him. It is not, however, necessary to take the point further for whichever view is taken the result is that the Award is *pro tanto* bad and something will have to be done about it."

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"From the foregoing critical exegis of the Award it follows that it is bad for two reasons. The first is that by reason of the arbitrator's refusal to consider the question of limitation there is either an error of law on the fact of it or a failure on the part of the arbitrator to consider the whole of the questions referred to him. The second is that the failure of the arbitrator to deal with the question of costs amounts to misconduct.

"The Award, therefore, cannot stand and the only question that remains for me to decide is whether it should be set aside or remitted.

"This is a matter for my discretion (See **Odlum** v. **Vancouver City and Canadian Northern Pacific Railway Co.**[3]), and in exercising that discretion I have borne in mind what was said by Devlin J. in the case of **Kiril Mischeff, Ltd. v. Constant Smith & Co.**[4]. I propose to deal with the matter in this way. The proceedings before the arbitrator were lengthy and I am entitled to assume expensive. There were clearly difficult questions of fact of a highly technical nature to be considered. I think it would be wrong to make an order which would result in all this being thrown away particularly when it seems to me the two questions outstanding can be settled comparatively expeditiously and economically. There is, too, the consideration that on the pleadings the question of limitation only arises in relation to one of the four sub-leases. On the other hand, I do not think that I would be doing justice to the parties if I were to give the arbitrator a completely free hand in the matter. The Award will accordingly be remitted to the arbitrator with a direction that he should consider the questions of costs and whether the Sub-lessee's claims are barred by limitation but that he should state his decisions on these two questions in the form of a special case.

"I would add that I am making this Order under Section 11 and not under Section 20 of the Ordinance. I feel I should make that clear in view of what was said in the case of **Re An Arbitration between Montgomery, Jones and Co. and Liebenthal and Co.**[5]."

The applicants appealed against that part of the decision by which the award was remitted to the arbitrator. The appeal was heard on 19th, 20th, 21st and 22nd October, 1954.

Mathew C.J. : — This appeal has been very fully presented and very carefully argued. The whole unhappy history of the arbitration, the subject of the present appeal, has been fully set out by the learned Judge in the Court below, as have been the detailed criticisms of the award made by the arbitrator. No good purpose will be served in setting them out again, as the only point in this appeal is whether the award should have been remitted or set aside.

Sir Roland Braddell's main argument is summarised in paragraph 18 of his grounds of appeal, which reads :—

"The appellants submit that upon a perusal of the Award and the Summary it is apparent that the Arbitrator did not appreciate what his duties were in relation to the differences submitted to him, did not apply his mind properly to those duties, expressed himself in ambiguous or inconsistent language, misconstrued the Agreement, and did not determine all the differences submitted to him. The appellants submit accordingly that there was misconduct on the part of the Arbitrator and that the Award ought to be set aside wholly; and the appellants submit that the proceedings in the Arbitration and the nature of the Award and the Summary are so unsatisfactory that they amount to misconduct on the part of the Arbitrator by reason of which the Award ought to be set aside wholly."

That the award is bad I am satisfied, and I can see no profit in considering whether the award is worse than what the learned Judge found it to be. The real question is whether justice will be done to the parties by remitting the award.

The learned Judge was very properly concerned with avoiding expense to the parties, and he was influenced in making the order that he did by the decision in *Kiril Mischeff Ltd. v. Constant Smith & Co.*[4]. In this particular case the award was remitted to enable the arbitrator to cure a defect in the reasoning. In the course of his judgment Devlin J. said (at p. 621) :—

"It seems to me that I ought to consider first what is the error of law which the arbitrators have made. One possible view is that they have completely failed to understand a clear and simple contractual provision in the sort of document with which they spend the whole of their commercial lives. Another possible view is that they have a good reason for what they did but have omitted some essential step in their reasoning. I am quite unable to hold that in these latter circumstances, should they exist, there is any rigid rule that, because there is an error of law on the face of an award, it should never go back. As a matter of general principle, if an award contains defective reasoning, and the defect may be due not to an error of law, but to an omission to set out some step in the arbitrator's reasoning, I think it not improper to send it back for the cure of that defect of reasoning. It is true that the arbitrators are not obliged to give any reason for their decision; but if they have done so, and it appears to be defective, I cannot see why they should not be given an opportunity of curing that defect."

And (at p. 622) :—

"In all these matters that is the determining consideration with regard to the use of discretion by the Court: the Court should have in mind the fact that the parties have chosen this form of tribunal and the arbitrators, and, if it is avoidable, they are not to be put to the expense of starting denovo. I should qualify that general statement by saying that an award should be remitted only if that can be done with justice to the parties. This is a matter which requires consideration here because of the rather unusual nature of the defect in this case. If the award were to be sent back for reconsideration generally, with complete liberty to amend, the arbitrators might simply strike out their reason, in which case the award could not be successfully attacked. The Court cannot permit that to be done. The arbitrators having given a reason, I think that a party who desires to do so ought to be able to show the Court on the face of the award what moved the arbitrators to reach the decision which they did."

In my view, justice cannot be done in this case by remitting the award to the arbitrator. He has consistently taken up the attitude that he would only decide questions which related to mining and on which as a mining engineer he was competent to express an opinion, but anything relating to law he would not decide. The fact that he may have decided certain points of law without realising that he had done so aggravates the position.

I can see no alternative but to allow this appeal with costs and order that the award be set aside. The deposit in Court will be paid out to the appellants.

Murray-Aynsley C.J. (S.) : — I have had the advantage of reading the judgment of the Chief Justice of the Federation of Malaya. It expresses my views so exactly that it is not necessary to add anything.

I agree with the view of the Judge who heard the matter in the Court below that it is desirable to salvage arbitration proceedings where possible. In the present case it is not possible. The arbitrator has taken a fundamentally wrong view of his function. No supplementary findings can put the matter right.

I concur in the proposed order.

Pretheroe J. : — I have had the advantage of reading the judgment prepared by the learned President and, with respect, I am in agreement with it. As we are differing from the learned Judge in the Court below however I will add a few words of my own.

There were numerous grounds of appeal and, in my opinion, the appellants are entitled to succeed on several of them. For present purposes I propose to consider one ground only viz. that the award is bad for ambiguity. In the award the following appears :—

> "I find that, having due regard to force majeure, the Miners, and therefore the sub-lessee, have complied with their part of the Agreement . . . . ."

What does "force majeure" mean as used in the above excerpt? It seems fairly certain that the phrase is not used in its strict legal sense. Then in what sense is it used? The learned Judge in the lower Court devoted considerable time considering this matter and ultimately (after agreeing that the expression was "unfortunate") was able to arrive at a decision. This was "that the arbitrator in considering the question has taken into account certain statutory restrictions placed on the output of tin and the effect of the late war." This may very well be the correct solution but it is the duty of an arbitrator to prepare an award which the parties to the submission can understand and in this case one of the parties (the appellants) cannot understand it. The fact that the learned Judge in the lower Court had to spend so much time and trouble to ascertain the meaning of the expression shows that, at the best, there is much obscurity in this finding.

Before this Court Sir Roland Braddell, for the appellants, made several submissions on this aspect of the appeal but relied chiefly on that which alleged that there is a patent ambiguity on the face of the award. In his reply Mr. Smith, for the respondents, adopted the reasoning and the decision of the learned Judge in the lower Court and left it at that.

As I am at a loss to understand what the Arbitrator meant it necessarily follows that, as far as I am concerned, Sir Roland Braddell's submission must succeed. With respect to the learned Judge in the lower Court the award is, in my opinion, ambiguous. In several cases, notably *Re Tidswell*[6], it has been held that uncertainty or ambiguity in an award "is a fatal objection" and the award must be set aside. For this additional reason, therefore, I agree that this award must be wholly set aside.

Appeal allowed.

[The appeal came again before the Court on May 28, 1955 when after hearing further arguments the Court unanimously certified for two counsel for the appellants in respect of the costs of the appeal, and allowed the appellants costs of the motion in the Court below. No order was made as to costs of the abortive arbitration proceedings.

The respondents then moved the Court for leave to appeal to the Privy Council and for stay of execution. The value of the subject matter exceeded $4,500. Counsel for the respondents asked for conditional leave to appeal and stay of execution pending appeal.

Counsel for the appellants submitted that the order setting aside the award was interlocutory. *In re Crŏasdell & Cammell Laird & Co. Ltd.*[7]. He further submitted that leave to appeal could only be granted if it was a fit one for appeal which it was not, and cited section 3(1) of the Appeal to His Majesty in Council Ordinance (No. 50 of 1949) which was similar to section 28 of the S.S. Courts Ordinance (*Mallal's* Straits Settlements Practice, pp. 662-4) and also similar to sections 109 and 110 of the Indian Civil Procedure Code. He submitted that the respondents must shew that a point of general or public importance was involved. *Ayyar v. Ayyar*[8], *Radha Kishen Das v. Rai Krishen Chand*[9] and *Govind Das v. Indrawath*[10].

The Court unanimously held that the order was an interlocutory order and that it was not a fit case for appeal to the Privy Council. Leave refused. *Ed: M.L.J.*].

Solicitors : *Das & Co.; Cheang Lee & Ong.*

CHAI WOOI v. PUBLIC PROSECUTOR

[C. A. (Whyatt C.J. (S), Good and Syed Sheh Barakbah JJ.) March 27, 1957]

[Ipoh — F.M. Criminal Appeal No. 50 of 1956]

Criminal Procedure Code (F.M.S. Cap. 6)Ch. XXI — Assessors — Rights and duties — participation in trial.

Interpretation and General Clauses Ordinance, 1948, s. 14 — Interpreting new provision substituted in existing statute.

The provisions of Chapter XXI of the Criminal Procedure Code confer on the assessors a right and a duty, not merely to be present throughout the trial, but to participate in the proceedings, even to the extent of causing execution to be stayed on the judgment if they hold opinions different from the Court which has passed